SUPREME COURT, U.S.

APR 5 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1060

OSCAR GRUSS & SON,

Appellant,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT OPPOSING MOTIONS TO CONFIRM

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April 3, 1967.

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Appellant, Oscar Gruss & Son ("Gruss"), is the owner, with partners and affiliates, of 14% of the outstanding First and Refunding Mortgage bonds ("first mortgage bonds") of The New York, New Haven and Hartford Railroad Company ("New Haven"). Gruss is appealing from a summary judgment of a three-Judge United States District Court for the Southern District of New York (Jurisdictional Statement, Appendix A) dismissing its complaint in an action to set aside, in part, two orders of the Interstate Commerce Commission ("Commission"). Appellees have filed motions to dismiss the appeal.[1]

[1] Three separate motions were filed: the "Commission motion" by the United States and the Commission, the "Penn-Central motion" by the intervening defendants The Pennsylvania Railroad

The New Haven is bankrupt. Proceedings for its reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, were commenced on July 7, 1961, and are pending in the United States District Court for the District of Connecticut (the "Reorganization Court"). The first mortgage bonds are outstanding in the principal amount of $76,819,900, with interest in default of approximately $18 million. The holdings of Gruss are approximately $10½ million principal amount, with interest in default of approximately $2½ million.

Gruss was permitted to intervene and become a party to proceedings before the Commission for the merger of Central into Penn (the "Penn-Central merger proceedings"), in which the Commission found that the merger could destroy the New Haven; and conditioned its approval of the merger upon the inclusion of the New Haven in the merged Penn-Central at some indefinite time in the future (327 I.C.C. 475). The Commission denied the petition of Gruss for modification of that condition to require inclusion of the New Haven at the time of the merger, and for a hearing on the proposed modification (328 I.C.C. 304, Appendix B to Jurisdictional Statement).

The Gruss complaint, seeking judicial review of the denial of his petition, was filed pursuant to the Judicial Code, particularly 28 U.S.C. §2323. The complaint was summarily dismissed on the sole ground that Gruss had no standing to institute or maintain the action.

As shown in the Jurisdictional Statement, pp. 19-27, the Court below erred in so holding. The motions to dismiss do not deny the misreading by the Court below of

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Company ("Penn") and The New York Central Railroad Company ("Central"), and the "Trustees' motion" by the intervening defendants Richard Joyce Smith and William J. Kirk, Trustees of the property of the New Haven (the "New Haven Trustees").

Alleghany Corp. v. *Breswick & Co.*, 355 U.S. 151 (1957), and strain to distinguish this Court's holding that the appellees in *Breswick* did have standing to challenge both the Commission orders. The standing of Gruss to challenge the Commission orders here is based on an interest far more substantial, and far more directly threatened by the Commission orders, than the interest of the appellees in *Breswick*. It is an interest which, when the Gruss petitions were filed, was not represented by anyone else in the Commission proceedings. The New Haven Trustees had flatly committed themselves not to oppose Penn and Central, whatever the interests of the estate and of bondholders. (Jurisdictional Statement, p. 12).

The opinion of the Court below, and the three motions to affirm, are based upon the underlying assumption that to hear and determine the contentions of Gruss on the merits, or to grant the relief he seeks, would delay consummation of the merger of Penn and Central, and that the public interest demands immediate consummation of that merger in its present context. That assumption, never soundly based, has been proven erroneous by the decision of this Court in *Baltimore & Ohio R. Co.* v. *United States*, — U.S. — (March 27, 1967), 35 U. S. Law Week 4271. The Court there reversed the judgment of the three-Judge District Court (the same Court as the one below here) that had denied an interlocutory injunction to restrain consummation of the merger, and remanded the cause with instructions that it be remanded to the Commission for further proceedings. We have thus reached the point, foreseen in note 6 at page 10 of the Commission motion, at which this Court might "appropriately remand the present case for further consideration of the merits of appellant's suit."

That suggestion requires some amplification, but is essentially sound. It is one thing for the Commission

and the Court below to decide that a merger scheduled to proceed at breakneck pace should not be flagged down, even briefly, to allow the New Haven aboard by way of inclusion. However, the petition for simultaneous inclusion of the New Haven involves different considerations at a time when the merger is waiting at the station, held there by factors other than the needs of the New Haven, and held by an order of this Court deciding in favor of other roads seeking protection, issues very similar to those being raised by Gruss in his complaint to the Court below.

In view of the basic change in circumstances that has occurred, it is unnecessary to deal at length with the erroneous views expressed in the motions concerning the merits of Gruss' petition. It is enough to point out again, as in the Gruss petitions to the Commission, that a condition requiring inclusion of the New Haven simultaneously with the Penn-Central merger need not delay that merger at all. It would be wholly feasible for Penn-Central, at that point, to take over the New Haven properties and operations subject to existing liens. The liens would be cancelled later against payment of their equitable equivalent, in cash or in kind, as finally determined in the consolidated proceedings now pending for the inclusion of the New Haven in the Penn-Central merger and for the reorganization of the New Haven.[2]

These proceedings have emphasized the necessity for allowing Gruss, as a major bondholder of the New Haven, a genuine opportunity to be heard. As shown in the Juris-

[2] Those proceedings were referred to a hearing examiner by order of the Commission dated November 9, 1966. The hearings commenced on January 16, 1967, and are nearing conclusion. The final sessions are to commence on May 3, 1967. There is to be no report of the hearing examiner. Briefs are to be submitted to the Commission on June 5, 1967, reply briefs on July 17, 1967, after oral argument, which has been tentatively scheduled for June 15, 1967.

dictional Statement (page 12) the New Haven Trustees have disabled themselves, by commitments undertaken in the April 21 Document, from representing bondholders or opposing Penn-Central. They have vigorously opposed the representation of bondholders and supported Penn and Central throughout the proceedings. The suggestion in the motions that bondholders may be heard in the Penn-Central merger proceedings only through the New Haven Trustees, and not through their own counsel, would mean that bondholders cannot be heard at all.

Conclusion

The Court should take jurisdiction of the appeal, reverse the summary judgment of the Court below, and remand the cause with instructions that it be remanded to the Commission for a hearing on the merits of the Gruss petitions.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

OSCAR GRUSS & SON *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1060. Decided May 8, 1967.

PER CURIAM.

Appellant is a bondholder of the New York, New Haven and Hartford Railroad Company (the New Haven), which is now undergoing a reorganization under § 77 of the Bankruptcy Act. On April 6, 1966, the Interstate Commerce Commission directed inclusion of the New Haven in the merger of the New York Central Railroad Company and the Pennsylvania Railroad Company as soon as terms and conditions could be settled, but approved the Penn-Central merger and authorized its consummation prior to such inclusion. Appellant then petitioned the Commission to reconsider this order. The Commission allowed appellant to intervene but denied the petition to reconsider, and appellant then challenged the Commission's order of April 6 in the District Court, which dismissed the complaint on the ground, among others, that appellant lacked standing to attack the Penn-Central merger. Since that time this Court has reviewed other aspects of the Commission's order approving the merger and has directed a remand to the Commission for further proceedings. *Baltimore & Ohio R. Co.* v. *United States*, — U. S. —. Since the order which appellant's suit attacked is now subject to further consideration by the Commission and since proceedings to achieve inclusion of the New Haven are also under way before the Commission, it appears inappropriate to review the decision of the District Court at this time.

Rather, we vacate the order of the District Court and remand the case to that court. Should appellant still be dissatisfied with the ultimate order of the Commission in the merger proceedings, it may attempt a fresh challenge in the District Court.

It is so ordered.